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10  
11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
13 SAN JOSE DIVISION

14  
15 **IGNACIO PENA,**

Petitioner,

16  
17 v.

18 **D.K. SISTO, Warden,**

19 Respondent.

No. C 07-3056 JW (PR)

**RESPONDENT'S NOTICE OF  
MOTION AND MOTION TO  
DISMISS; SUPPORTING  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

20  
21 TO PETITIONER IGNACIO PENA, IN PRO PER:

22 PLEASE TAKE NOTICE that Respondent moves to dismiss the Petition for Writ of  
23 Habeas Corpus, pursuant to 28 U.S.C. § 2254 and Rule 4 of the Rules Governing § 2254 Cases  
24 in the United States District Courts, on the ground that the petition is brought beyond the statute  
25 of limitations. This motion is based on the notice and motion, the supporting memorandum of  
26 points and authorities and exhibits, the petition for writ of habeas corpus, the court records in this  
27 action, and other such matters properly before this Court.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**INTRODUCTION**

Petitioner Ignacio Pena (D-17862) is a California state prisoner proceeding pro per in this matter. Pena is lawfully in the custody of the California Department of Corrections and Rehabilitation following his conviction for second-degree murder and use of a firearm, for which the court sentenced him to seventeen years to life. (Pet. 2 & ii.) In this petition, Pena challenges the Board of Prison Terms' November 18, 2002 decision denying him parole. (Pet. iii.) This Court should dismiss the petition because Pena filed it beyond the one-year statute of limitations.

**ARGUMENT**

**THIS PETITION SHOULD BE DISMISSED BECAUSE PENA FILED IT AFTER THE ONE-YEAR STATUTE OF LIMITATIONS LAPSED.**

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to all federal petitions for writs of habeas corpus filed on or after its April 24, 1996 effective date. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Accordingly, AEDPA applies to this petition.

AEDPA enacted a one-year statute of limitations period during which a § 2254 federal habeas corpus petition must be filed. 28 U.S.C. § 2244(d)(1). The statute of limitations begins to run from the latest of four circumstances, 28 U.S.C. § 2244(d)(1), only one of which is relevant to this case. *See id.*; *Redd v. McGrath*, 343 F.3d 1077, 1079 (9th Cir. 2003). Specifically, the statute of limitations begins to run one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). In the parole suitability context, a petitioner becomes aware of his claims on the date his administrative appeal of the underlying parole suitability hearing is denied. *Redd*, 343 F.3d at 1079, 1084-85. The statute of limitations begins to run the following day. *Id.* at 1084.

The statute of limitations is tolled during the entire period that the petitioner is seeking state collateral review of his claims, 28 U.S.C. § 2244(d)(2), beginning when the petitioner initially files his habeas claim in the state superior court until the state supreme court denies the petition. *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). Thus, tolling applies to one full

1 round of collateral review. *Carey v. Saffold*, 536 U.S. 214, 223 (2002). The statute of  
 2 limitations is not tolled, however, if the petitioner has unreasonably delayed in the filing of his  
 3 petitions for collateral review. *Evans v. Chavis*, 546 U.S. 189, 200-01 (2006). That is, if the  
 4 petitioner does not file a higher level petition within a reasonable time, the petition is not  
 5 considered “pending,” and thus, the time will not be tolled. *Id.* at 193.

6 Pena submitted an administrative appeal on January 2, 2003 (Ex. 1), which the Board  
 7 denied on July 8, 2003 (Ex. 2 at 1). Assuming Pena’s administrative appeal fairly addresses the  
 8 same concerns he raises in his federal petition, the statute of limitations began running on July 9,  
 9 2003. *Redd*, 343 F.3d at 1084. Thus, Pena’s federal habeas petition must have been filed one  
 10 year later, unless time was tolled. 28 U.S.C. § 2244(d)(1)-(2). Pena’s superior court petition was  
 11 filed on January 9, 2004. (Ex. 3 at 1.) The time between the date his administrative appeal was  
 12 denied (Ex. 2 at 1) and his superior court petition was filed (Ex. 3 at 1) was 185 days. In  
 13 addition, the time between the California Supreme Court’s denial of his petition for review on  
 14 July 19, 2006 (Ex. 8)<sup>1</sup> and the filing of this federal petition on June 12, 2007, was 358 days and  
 15 is not tolled. *See* 28 U.S.C. § 2244(d)(2). Thus, 543 (185 + 358) days are not tolled and Pena’s  
 16 federal petition is untimely by 178 days. Accordingly, this Court should deny the petition on this  
 17 information alone.

18 In addition to the delays mentioned above which are sufficient in themselves to find this  
 19 petition untimely, the time between Pena’s superior court denial on January 4, 2005 (Ex. 4 at 1)  
 20 and his appellate court filing on November 2, 2005 (Ex. 5) was 302 days. This 302-day delay is  
 21 unreasonable, and the time should not be tolled because it exceeded the time normally provided  
 22 by state courts to file an appeal, and far exceeded the time allowed by California to file a notice  
 23 of appeal. *Culver v. Dir. of Corr.*, 450 F. Supp. 2d 1135, 1140 (C.D. Cal. 2006) (finding that a  
 24 ninety-seven-day delay between the denial and filing of the next level petition was unreasonable);  
 25 *cf. Chavis*, 546 U.S. at 201 (finding that an unjustified six-month delay between the appellate  
 26 court denial and filing in the California Supreme Court was unreasonable because it exceeded the

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27 1. Respondent does not rely on Exhibits 6 and 7, and simply provides them to reflect the  
 28 entire state court proceedings.

thirty to sixty days that most states provide for filing an appeal to the state supreme court and was far longer than the ten-day period California gives a losing party to file a notice of appeal in the California Supreme Court). The delay is especially unreasonable because Pena's appellate court petition appears to be substantively identical to his superior court petition. (*Compare* Ex. 3, with Ex. 5); *but cf. Osumi v. Giurbino*, 445 F. Supp. 2d 1152, 1158-59 (C.D. Cal. 2006) (finding that an approximate three-month interval between the superior court decision and filing of the appellate court petition was not unreasonable considering the appellate court petition was lengthy and reflected a substantial rewriting of the superior court petition). Because Pena's delay in filing his appellate court petition was unreasonable, the appellate court petition was not "pending." *Chavis*, 546 U.S. at 191. Thus, the time between the superior court denial and appellate court petition should not toll the statute of limitations. *Id.* at 200-01.

In summary, Pena's petition was untimely by 178 days, and even more so if this Court finds that his petition was not tolled during the state court proceedings as described above. Thus, because Pena's petition was filed beyond the one-year statute of limitations, this Court should dismiss the petition as being untimely.

Dated: October 25, 2007

Respectfully submitted,

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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **PENA, IGNACIO v. D. K. SISTO, Warden**

No.: **C07-03056 JW**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **October 26, 2007**, I served the attached


**RESPONDENT'S NOTICE OF MOTION AND MOTION TO DISMISS;  
SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

**Ignacio Pena, D-17862  
California State Prison, Solano  
2100 Peabody Rd  
P.O. Box 4000  
Vacaville, CA 95696-4000  
in pro per**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **October 26, 2007**, at San Francisco, California.

\_\_\_\_\_  
J. Palomino  
Declarant

  
\_\_\_\_\_  
Signature